Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
	)	
Implementation of Section 601(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S WEST, Inc., for Waiver of Section 22.903 of the Commission's Rules	)	

REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.

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AT&T Wireless Services, Inc. ("AT&T"), by its attorneys, hereby submits its reply comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

Without any basis to claim that conditions in the local exchange market have changed, the Bell Operating Companies ("BOCs") generally call for immediate repeal of the cellular structural separation requirement. They argue that there has been no proof of BOC anticompetitive behavior toward commercial mobile radio services ("CMRS") providers, that existing nonstructural safeguards combined with the new competition mandated by the

Telecommunications Act of 1996 ("1996 Act") are sufficient to prevent discrimination and cross-subsidization, and that regulatory parity concerns warrant elimination of the structural separation requirement.

These arguments are without merit, particularly with respect to the BOCs' assessment of CMRS providers' satisfaction with current interconnection arrangements. As the Commission has found in this and other proceedings, LECs continue to refuse to pay compensation for terminating their traffic on CMRS networks, and they continue to charge CMRS providers significantly higher interconnection rates than those charged to landline competitors.

This inequitable situation has been made possible by the bottleneck control of the local exchange networks enjoyed by BOCs and other incumbent LECs. While the 1996 Act has begun to remove barriers to entry into the local exchange market, that process is still in its infancy. Given the recent court stay of the Commission's pricing and "pick and choose" regulations implementing the statute, moreover, the process of creating meaningful competition in the local telephone industry has certainly become more complicated, and likely has been delayed. The BOC position that the 1996 Act has somehow transformed the marketplace overnight simply is not credible.

Similarly, existing nonstructural safeguards, such as price cap regulation and accounting rules, deter only the most egregious forms of cross-subsidization and do not address other forms of discrimination. Without structural separation, these safeguards are wholly inadequate to address the problems caused by monopolist carriers' entry into competitive markets.

The BOCs are also incorrect that Congress's regulatory parity objectives require elimination of the cellular structural separation requirement. There has never been a legislative intent, far less a mandate, to remove regulations that are necessary in light of market conditions.

Finally, the Commission should adopt rules to ensure that joint marketing by BOCs of their local exchange and wireless services is carried out in a manner that promotes competition. Specifically, AT&T agrees with the Commission's tentative conclusion that joint marketing of services be done on a compensatory, arms-length basis. In addition, these sales and marketing arrangements must be reduced to writing and BOCs must permit unaffiliated entities to market their local exchange services on a nondiscriminatory basis.

I. STRUCTURAL SEPARATION IS ESSENTIAL UNTIL THERE IS MEANINGFUL EROSION OF THE LOCAL EXCHANGE MONOPOLIES

A. The Long History of Incumbent LEC Anticompetitive Abuses Warrants Continued Structural Separation

The record in this proceeding and others belies the BOCs' contention that there is no evidence of BOC discrimination or cross-subsidization in the CMRS marketplace.[1/] As the Commission observed in the First Local Competition Order, almost all incumbent LECs have continually violated the Commission's requirement that compensation be paid to wireless providers for the termination of landline-originated traffic and, in some instances, LECs have

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[1/] See, e.g., Comments of BellSouth Corporation ("BellSouth Comments") at 17; Comments of Ameritech ("Ameritech Comments") at 9; Comments of SBC Communications, Inc. ("SBC Comments") at 4.

actually demanded payment for the termination of their calls on CMRS networks.[2/] Numerous commenters in that proceeding provided overwhelming evidence that, as a result of their inferior bargaining power, CMRS providers have for years been forced to accept interconnection rates far above cost with little or no mutual compensation.

SBC points to the absence of formal complaints as evidence that BOCs have not behaved in an anticompetitive fashion with regard to their cellular operations.[3/] This overused LEC argument proves nothing. As AT&T noted, CMRS providers have sought mutual compensation and nondiscriminatory interconnection rates from LECs for many years and have consistently asked state commissions to ensure LEC adherence to these principles. When the states failed to protect wireless providers, AT&T repeatedly urged the Commission to take preemptive action. In the First Local Competition Order, the Commission finally recognized that explicit federal oversight was needed if CMRS providers were to receive the rights accorded them by statute and FCC policy.[4/] Contrary to SBC's suggestion, CMRS providers have been anything but silent about discriminatory LEC behavior.

Several commenters also point to specific instances of improper BOC cross-subsidization. The Public Utilities Commission of Ohio ("PUCO"), for instance, refers to

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[2/] In the Matter of Implementation of the Leased Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325, at ¶ 1094, n.2632 ("First Local Competition Order"); see id. at ¶ 1042.

[3/] SBC Comments at 4; see also Comments of GTE ("GTE Comments") at 4.

[4/] See First Local Competition Order at ¶¶ 1025, 1087, 1094. SBC's statement that BOCs with large out-of-region cellular systems would not be advocating elimination of the structural separation rule if they had been subject to discrimination merely proves how lucrative abuse of the local exchange monopoly has been. See SBC Comments at 4-5.

the Joint Federal/State Audit of the Ameritech Telephone Operating Companies' transactions with their affiliate, Ameritech Services, Inc.[5/] In that audit, the investigators concluded that Ameritech had failed to allocate costs properly between its local exchange and competitive businesses. Indeed, based on the audit, PUCO correctly points out "unless structural separate subsidiaries are maintained, LECs could allocate a disproportionate amount of joint and common costs to local exchange services thereby needlessly inflating the cost for local service interconnection, and correspondingly lowering the costs for less regulated wireless operations, which will increase cellular profits and thwart competition."[6/]

It is rather incredible that the BOCs can maintain that there is no evidence of anticompetitive behavior in the face of the multitude of examples of their outright violation of the Commission's rules regarding mutual compensation for CMRS providers as well as the state and FCC adverse findings on cross-subsidization. This enormous BOC blind spot undercuts their arguments that the structural separation requirement is not necessary to deter discrimination and improper cost-shifting. At least until there is meaningful competition in the local exchange market, the Commission should retain its existing policies on structural separation.

[5/] Initial Comments of the Public Utilities Commission of Ohio ("PUCO Comments") at 6.

[6/] PUCO Comments at 7.

B. Existing Nonstructural Safeguards are Inadequate to Protect Against Anticompetitive Behavior

As the Commission acknowledges, the factual predicate underlying the adoption of the cellular structural separation requirement -- the BOCs' ability to leverage their monopoly power into competitive markets -- still exists today.[7/] Yet the Commission proposes to eliminate the requirement, and suggests that other measures may be sufficient to deter discrimination and cross-subsidization. Given the likelihood that the BOCs will retain their local exchange bottlenecks for the foreseeable future, the Commission should retain the structural separation requirement rather than eliminate it precisely at the time when the LECs' incentives to discriminate are heightened.

Some LECs assert that passage of the 1996 Act[8/] and the Commission's implementing regulations have resulted in an environment in which anticompetitive conduct is impossible. GTE argues, for example, that the rights guaranteed under Sections 251 and 252 of the 1996 Act "contain all the regulatory protections that are necessary to ensure that unaffiliated telecommunications carriers gain fair interconnection to an ILEC's network."[9/] Similarly, Ameritech contends that no further safeguards beyond the Commission's adoption of the total element long run incremental cost ("TELRIC") standard is required to deter price

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[7/] In the Matter at Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, WT Docket No. 96-162, FCC 96-316, at ¶ 42 (rel. Aug. 13, 1996) ("Notice").

[8/] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[9/] GTE Comments at 10.

discrimination.[10/] Ameritech states that TELRIC "is the very standard (cost-based pricing) [the 1996 Act] uses to protect competitive local exchange carriers ('CLECs') from the possibility that a LEC might unfairly favor its own LEC operations."[11/]

As a threshold matter, the local competition envisioned by the 1996 Act will not develop until the statute is fully implemented. Given that the United States Court of Appeals for the Eighth Circuit has just stayed the effectiveness of the Commission's pricing rules, including the very TELRIC standard espoused by Ameritech as a primary justification for repealing the separate subsidiary requirement, it is not clear that widespread competition will be forthcoming in the near-future.[12/] The 1996 Act does not and cannot supply a sound basis for repealing the structural separation requirement at least until its provisions are fully and effectively implemented, and prospective entrants have a meaningful opportunity to take advantage of them.

Nor should the Commission give credence to incumbent LEC arguments that they should be free of the structural separation requirement because AT&T does not have to provide cellular service through an affiliate. Unlike the incumbent LECs, AT&T does not

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[10/] Ameritech Comments at 6.

[11/] Id. Similarly, U S WEST states that "[g]iven the TELRIC pricing standard, it is no longer possible for an incumbent LEC to obtain any unfair advantage in the CMRS market, because no service may cross-subsidize any other." Comments of U S WEST, Inc. ("U S WEST Comments") at 10.

[12/] Iowa Utilities Board v. FCC, No. 96-3321 (8th Cir., filed Oct. 15, 1996) (order granting stay of pricing and "pick and choose" provisions of First Local Competition Order).

control an essential local bottleneck over which virtually all CMRS traffic must travel.[13/] AT&T possesses neither the ability nor the incentive to discriminate against unaffiliated CMRS providers or to shift costs from the competitive CMRS market to the even more competitive long-distance market. Moreover, contrary to SBC's and U S WEST's assertions, AT&T's size does not protect it from discrimination in interconnection negotiations with incumbent LECs.[14/] As AT&T noted in an earlier proceeding, it has been able to enter into only one mutual compensation arrangement with a LEC to date, and in that case the interconnection rates charged to AT&T's wireless operations are considerably higher than those paid by landline carriers.[15/]

Similarly, existing price cap regulation and accounting safeguards are not adequate protection against incumbent LEC anticompetitive behavior. As AT&T has demonstrated, the sharing mechanism and the periodic readjustment of the productivity factor permitted under price caps regulation provide incentives to adjust costs to achieve a desired outcome.[16/] Comcast agrees that the current price cap regime rewards LECs that misallocate costs to regulated telephony by lowering the productivity benefit that must be shared.[17/]

[13/] See SBC Communications, Inc. v. FCC, 56 F.3d 1483, 1491-92 (D.C. Cir. 1995) ("nearly every cellular long distance call must travel across a BOC's landlines in order to reach an IX carrier's network").

[14/] Cf. SBC Comments at 9; U S WEST Comments at 11.

[15/] Comments of AT&T Corp., Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, filed March 4, 1996, at 8.

[16/] Comments of AT&T Wireless Services, Inc. ("AT&T Comments") at 8

[17/] Comments of Comcast Cellular Communications, Inc. at 24.

Comcast likewise shows that the Commission's current accounting rules are insufficient to protect against cross-subsidization.[18/] Because of the substantial discretion given the LECs under Part 64, their incentives and opportunities to misallocate costs are not appreciably affected by the accounting rules.

C. Regulatory Parity Concerns do not Require Repeal of the Cellular Structural Separation Requirement

The BOCs generally argue that the Commission's failure to impose structural separation on the provision of all CMRS by all LECs requires the Commission to eliminate the requirement for BOC provision of cellular service. BellSouth, for instance, states that the decision of the United States Court of Appeals for the Sixth Circuit in Cincinnati Bell Telephone Co. v. FCC requires immediate repeal of Section 22.903 because "[t]here can be no reasoned explanation . . . for applying the requirement only to BOCs, while exempting other LECs, or for applying it to cellular service when it is not needed for competing services such as broadband PCS."[19/]

As U S WEST acknowledges, Congress never intended "parity for its own sake."[20/] Requirements that are necessary in current market conditions should be retained until those conditions change. As explained above, the BOCs have demonstrated no changed circumstances that would warrant eliminating the structural separation requirement for BOC provision of cellular service.

[18/] Id. at 11-12.

[19/] BellSouth Comments at 12.

[20/] U S WEST Comments at 22.

To the extent there is any merit to BellSouth's argument, it supports extension of Section 22.903 to all Tier 1 LECs in connection with their provision of all CMRS, not repeal of cellular structural separation rule. Like the BOCs, incumbent Tier 1 LECs have monopoly control of the local exchange and, thus, possess the same incentives and ability to thwart competition by unaffiliated CMRS providers. Contrary to GTE's assertion, there have been numerous instances of anticompetitive behavior by non-BOC Tier 1 LECs toward interconnecting wireless providers.[21/] The independent LECs provide no evidence to support their claims that the costs of imposing structural separation requirements on their provision of CMRS would outweigh the benefits of such a rule extension.[22/]

While AT&T believes that extension of structural separation requirements to incumbent LEC provision of all CMRS would best serve the public interest, it agrees with U S WEST that there is adequate justification for imposing less restrictive requirements on LECs providing PCS than on LECs providing cellular service if the Commission decides to do so.[23/]

[21/] See GTE Comments at 7.

[22/] GTE's claims ring particularly hollow considering that regulators have concluded that GTE is "doing everything [it] can to fight competition." Mike Mills, Holding the Line on Phone Rivalary, The Washington Post, Oct. 23, 1996, at C12, C14 (quoting Virginia State Corporation Commission official). Despite the fact that GTE is the nation's largest local telephone company with revenues of $20 billion in 1995, it is trying to avoid its obligations under the 1996 Act by convincing state regulators to declare it a "rural" telecommunications carrier. Id.

[23/] See AT&T Comments at 14 n.34. As AT&T pointed out, the significantly greater degree of geographic overlap between LEC landline and cellular holdings than between LEC landline and PCS holdings also provides a reasonable basis for treating LEC provision of PCS differently. Id. Similarly, as U S WEST notes, the likely competitive hurdles to be faced by PCS operators provide "a factual basis for treating cellular differently than PCS -- at least until PCS systems become operational." U S WEST Comments at 22-23.

At the very least, the Commission should retain the structural separation requirement for BOC provision of cellular service. As U S WEST acknowledges, because of Congress's removal of the restriction on joint marketing, the cellular separate affiliate requirement in place today is very different than the rule reviewed by the Sixth Circuit Court of Appeals in Cincinnati Bell.[24/] Consequently, U S WEST concludes that, for the present, the Commission would be justified in retaining Section 22.903 as applied to cellular service.[25/] AT&T submits that the appropriate time to consider repeal would be when the 1996 Act's mandate "for unrestricted entry into the LECs' local exchange and exchange access business"[26/] has created more than just an opportunity for new competition, and has actually resulted in significant erosion of the incumbent LECs' bottleneck monopolies.

II. THE COMMISSION MUST ENSURE THAT JOINT MARKETING PRACTICES DO NOT UNFAIRLY ADVANTAGE BOCs IN THE COMPETITIVE MARKETPLACE

In its comments, AT&T urged the Commission to ensure that there are sufficient safeguards to prevent the BOCs from engaging in joint marketing in a manner that would provide them with an unfair competitive advantage. While Section 601(d) of the 1996 Act expressly authorizes joint marketing of the CMRS affiliates' services with other BOC services,[27/] the FCC has correctly recognized that it retains jurisdiction to determine the

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[24/] U S WEST Comments at 23-24. U S WEST states that the Sixth Circuit's concern about "the inability of Bell cellular licensees from offering 'one-stop shopping' arrangements to consumers" has been addressed by the 1996 Act's provisions on joint marketing. Id.

[25/] Id. at iii.

[26/] Id. at 17.

[27/] See 1996 Act, § 601(d).

scope and interrelationship between this provision and related provisions of its rules and the 1996 Act.[28/] Accordingly, AT&T agrees with the FCC's tentative conclusion that the joint marketing of services must be on a compensatory, arms-length basis.[29/] Indeed, to promote fair competition, these sales and marketing arrangements must be reduced to writing and a BOC that jointly markets local exchange services and its affiliate's CMRS should be obligated to permit all unaffiliated entities to market the BOC's local exchange services on a nondiscriminatory basis.[30/]

Some BOCs object to any FCC action with respect to joint marketing on the ground that the Commission lacks the requisite authority.[31/] There is no valid basis to this position. Section 601(d) only authorizes the joint marketing of CMRS and other services. It does not strip the Commission of authority to ensure that such practices are consistent with the public interest and actually serve to promote, rather than thwart, fair competition.[32/] As the Commission correctly recognizes, safeguards requiring public disclosure of marketing

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[28/] Notice at ¶ 63.

[29/] AT&T Comments at 21.

[30/] Id. Cf. 47 U.S.C. 272(g)(1).

[31/] See, e.g., BellSouth Comments at 35-38; Comments of Bell Atlantic Corporation and NYNEX Corporation at 25; Comments of SBC at 11-12.

[32/] As the agency charged with promoting the public interest, the FCC has ample authority to meet its mandate. See Section 4(i), 47 U.S.C. Section 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issues such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."); see also Section 303(r), 47 U.S.C. Section 303(r) (The Commission shall "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act ... insofar as it relates to the use of radio....").

arrangements would enhance, not frustrate, a fair and level competitive marketplace.[33/] Thus, the adoption of appropriate joint marketing rules would serve the objective of Section 601(b), which, even BellSouth acknowledges, is to put the BOCs on a par with their competitors, not to give them a marketing advantage.[34/]

Finally, AT&T reiterates the need for safeguards that limit the joint installation, maintenance and repair of BOC cellular and landline local exchange services. These services do not constitute "marketing," and unless there are adequate regulatory checks to prevent improper cross-subsidization and discrimination, there is a significant risk that the BOCs could unfairly advantage themselves in the market through joint provision of these services.

[33/] See Notice at ¶ 64 (referring to the public interest in preventing and detecting abuses).

[34/] See BellSouth Comments at 35.

CONCLUSION

For the foregoing reasons, the Commission should adopt structural separation requirements for the provision of all CMRS by all incumbent Tier 1 LECs. In addition, the Commission should adopt regulations that ensure that the BOCs' ability to engage in joint marketing does not undermine CMRS competition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tanya Butler, hereby certify that on this 24th day of October, 1996, a copy of the foregoing "REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC." was served on the following by first-class mail, postage prepaid or by messenger (*).

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